Alternative Protocol A

This protocol essentially retains the Bishop-Fuller procedure, but streamlines it to fit within the newly revised Mass. R. Crim. P. 14 and the time standards set forth in Superior Court Standing Order 2-86. This protocol also provides forms by which the trial court could provide notice of the process to the third parties affected by it, including the alleged victim, the keeper of records, and the caregiver.

The Bishop protocol has had two major problems: lack of clarity on how the process should begin, and lack of clarity on how notice and an opportunity to waive or assert any privilege should be given to the alleged victim. Commonwealth v. Lampron, 441 Mass. 265 (2004), has dealt with the first problem; this protocol sets forth how Bishop could be modified to deal with the second. This protocol also attempts to streamline Bishop by consolidating Stages 1 and 2.

The timeline at the end of this protocol shows how it would modify Bishop to conform to the time standards imposed by Superior Court Standing Order 2-86 and the revised Rules of Criminal Procedure.

1. Motion for Order to Produce Records:

The defendant files a motion for an order to produce records that is supported by an affidavit complying with Mass. R. Crim. P. 13 as construed by Lampron, 441 Mass. at 270-271. The defendant must file this motion by the end of the pretrial hearing, absent good cause.

A Lampron hearing is then scheduled, at least 14 days after the filing of the motion. If feasible, the hearing should be scheduled for the same date as any discovery compliance hearing held pursuant to Mass. R. Crim. P. 11(c). Commentary:

For cases initiated after September 7, 2004, the defense may file a Lampron motion pursuant to either Mass. R. Crim. P. 14(a)(2) or 17(a)(2). See Jansen, Petitioner, 444 Mass. 112, 117 & n.11 (2005) (new Rule 14(a)(2) permits discretionary discovery of "material and relevant evidence" other than what is in possession of prosecution).

Time Requirements:

Mass. R. Crim. P. 13(d)(1) directs: "Any discovery motions shall be filed prior to the conclusion of the pretrial hearing, or thereafter for good cause shown." A Lampron motion pursuant to Rule 14 is a discovery motion, and so, absent good cause, it must be filed by the end of the pretrial hearing. See Mass. R. Crim. P. 14(a)(2).

A Lampron motion pursuant to Rule 17 is not a discovery motion, see Jansen, 444 Mass. at 117, but it too should have to be filed by the end of the pretrial hearing absent "good cause," for four reasons. First, although a Rule 17 Lampron motion is not for "discovery," it is enough like a Rule 14 Lampron motion that the same time requirements should apply. Second, a defendant may file Lampron motions pursuant to both Rule 14 and Rule 17, and in that case the motions should be filed and heard at the same time. Third, Mass. R. Crim. P. 11(b)(2)(iii) and Standing Order 2-86(VI) both require that a trial date be assigned at the pretrial hearing, but a judge cannot assign a meaningful trial date without any Lampron motion already having been filed. Finally, the defendant should be required to initiate the Bishop protocol as soon as possible after the Commonwealth's filing of the certificate of compliance, in order to leave enough time for the steps of the Bishop protocol to take place within the time standards dictated by Standing Order 2-86. Cf. Commonwealth v. Mitchell, 444 Mass. 786, 797

(2005) (noting that ex parte Rule 17(a)(2) motion should be filed after pretrial conference).

In the alternative, if a Rule 17 Lampron motion does not have to be filed by the end of the pretrial hearing, Mass. R. Crim. P. 13(d)(2) would apply. It provides: "A pretrial motion which does not seek discovery shall be filed before the assignment of a trial date pursuant to Rule 11(b) or (c) or within 21 days thereafter, unless the court permits later filing for good cause." Rule 11(b)(2)(iii) and Standing Order 2-86(VI) both provide for assignment of trial date at the pretrial hearing, and so a Rule 17 Lampron motion should have to be filed, at the latest, by 21 days after the pretrial hearing, absent good cause. Rule 11(c)(3) does raise the possibility for a later assignment of trial date in circumstances where discovery is incomeplete and so the trial date is assigned at a discovery compliance hearing, but those circumstances would usually amount to "good cause" for later filing of a Lampron motion.

Ex Parte Motions:

In "rare," "exceptional," "extraordinary" instances, a Rule 17(a)(2) Lampron motion may be filed ex parte, where the defendant has shown "(1) a reasonable likelihood that the prosecution would be furnished with information incriminating to the defendant which it otherwise would not be entitled to receive; or (2) a reasonable likelihood that notice to a third party could result in the destruction or alteration of the requested documents." See Mitchell, 444 Mass. at 797.

2. Notice to Witness[1]:

During the time between the filing of the Lampron motion and the Lampron hearing, the Assistant District Attorney (or victim-witness advocate) voluntarily transmits to the witness notice from the Court that the motion has been filed and of the date of hearing, including a form assertion/waiver of privilege [draft attached] also issued by the Court.

Commentary:

Transmitting the Notice to the Witness:

Although the Court issues the notice to the witness, ordinarily the prosecutor or victim-witness advocate will agree to transmit it to the witness. The notice would usually be one subject discussed in a conference pursuant to G.L. c. 258B, § 3(g), which provides that a victim has the right "to confer with the prosecutor . . . before any hearing on motions by the defense to obtain psychiatric or other confidential records." The notice must make clear that it was issued by the Court to the witness, so that the witness will not perceive that the prosecutor is taking steps to obtain the records on the defendant's behalf. There may be rare circumstances where the Commonwealth declines to transmit the court-issued notice (e.g.,

[1] Usually the records sought are those of the alleged victim, who is also usually the holder of any privilege or right of confidentiality; sometimes, the privilege holder may be a non-victim witness, or a guardian or parent may exercise the privilege on behalf of the alleged victim. For clarity, the holder of the privilege is referred to hereinafter as the "witness."

where the witness is not cooperating with the Commonwealth). In those circumstances, the clerk's office should transmit the notice to the witness.

In transmitting the notice to the witness, the prosecutor or victim-witness advocate should take steps to ensure that the witness completes it and returns it to the Court in a timely manner (e.g., by bringing it to the Court for the witness, or by providing the witness with a stamped envelope addressed to the Court). In addition to the form assertion/waiver of privilege, the prosecutor or victim-witness advocate should also give the witness a brochure to be promulgated by the Massachusetts Office of Victim Assistance informing the witness of possible sources of legal representation, including the Victim Rights Law Center. As Superior Court Standing Order 5-81 indicates, the availability of counsel for "Mary Moe" petitioners has greatly streamlined G.L. c. 112, § 12S proceedings. Further, the witness has the right to be heard on whether the witness asserts a privilege or the records are relevant, and may have counsel present. Cf. Hagen v. Commonwealth, 437 Mass. 374, 375, 379 (2002) (rape victim had G.L. c. 258B, § 3(f) right to address court about prompt disposition, but no standing to intervene and file motion).

If during this 14-day time period the prosecutor or victim-witness advocate cannot find the witness, or if there are reasons why the witness needs more time to decide whether to assert or waive the privilege, the prosecutor should move to continue the

Lampron hearing. The witness' failure to complete the form within the 14 days should not be deemed a waiver of all privileges.

Witness' Right to Notice:

This 14-day period is necessary to give the witness notice that the defense is seeking the records before any summons issues to the keeper of the records. Witnesses have property rights in their records that entitle them to at least minimal notice and an opportunity to be heard before the records are brought into court. These property rights derive from, e.g., statutory privileges; G.L. c. 233, § 1; G.L. c. 258B, § 3(g); Mass. R. Crim. P. 17; and HIPAA (including 45 C.F.R. § 164.512(e)(1)). These property rights may very often be outweighed by a defendant's right to present all proofs under the Fifth Amendment and Article 12. But those confrontation rights do not include any right to confront witnesses without the witnesses' knowing they are being confronted.

If the first the witness hears of the issue is a communication from the prosecutor (or keeper of records) that the judge has already allowed a Lampron motion, the witness is likely to perceive that the prosecutor (or the care provider) has not done enough to protect her/his rights. As a result, the witness may become uncooperative with the prosecutor (or the care provider). By getting notice prior to the Lampron hearing, the witness can attend and hear defense counsel make the argument

that based on the defense proffer the defendant's rights outweigh the rights of the witness, and hear the judge rule on the issue. Defense lawyers and motion judges should have no problem making their arguments and rulings in the presence of the witness.

Contents of Notice to Witness of Motion for Records:

In order to assert (or waive) a privilege, the witness need not understand the details of the specific statutory privilege that applies. It is enough for the witness to provide an affidavit asserting a privilege, and the keeper of records to provide an affidavit establishing what statutory privilege applies. Cf. Commonwealth v. Vuthy Seng, 436 Mass. 537, 544 (2002) ("'[W]hat Miranda requires "is meaningful advice to the unlettered and unlearned in language which [they] can comprehend and on which [they] can knowingly act."'") (quoting other cases).

3. Hearing on Motion for Production of Records and Order for Production:

No objection to language of Step 3 of Alternative Protocol B, except to add commentary below and form order to keeper of records and form protective order [forms attached].

Commentary:

To meet the Lampron standard for records sought pursuant to Rule 17(a)(2), the defendant must show good cause "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" Lampron, 441 Mass. at 269 (quoting U.S. v. Nixon, 418 U.S. 683, 699-700 (1974)). At this point, the standard for relevance is that the documents sought must have "a 'rational tendency to prove [or disprove] an issue in the case.'" Lampron, 441 Mass. at 269-270 (quoting Commonwealth v. Fayerweather, 406 Mass. 78, 83 (1989)). A judge has discretion to insist that the sources of the information in the Lampron affidavit be named. Lampron, 441 Mass. at 271.

To meet the standard for records sought pursuant to Rule 14(a)(2), the D must show that they are "material and relevant." See Jansen, 444 Mass. at 117 n.11. This is different from the Lampron standard. See Mitchell, 444 Mass. at 791 n.11.

The Commonwealth has a right to oppose the issuance of a Rule 17(a)(2) summons. See Commonwealth v. Lam, 444 Mass. 224, 228-229 (2005). The Commonwealth must file any memorandum in

opposition to the Lampron motion at or before the Lampron hearing. The Commonwealth has the right to inform the judge of "any privileges, privacy concerns, or other legitimate interests" pertaining to the records. Mitchell, 444 Mass. at 800.

The witness has the right to attend the Lampron hearing and/or submit a written assertion/waiver of privilege. The witness has the right to communicate to the prosecutor "any privileges, privacy concerns, or other legitimate interests" pertaining to the records.

In deciding whether a Lampron showing is sufficient, a judge may want to inquire of defense counsel: (1) if the defendant already has copies of or access to the witness' records (e.g., if the defendant is a parent of the witness); (2) if legal proceedings have been initiated to which the defendant, witness, or witness' parent/guardian is a party, in which the witness may be represented by counsel, and/or which may relate to the records sought (e.g., divorce, paternity, custody, visitation, care and protection, CHINS, termination of parental rights, adoption, G.L. c. 209A, malpractice against care provider, or premises liability); and (3) if counsel has checked the name(s) of the witness' caregiver(s) on the websites of the Boards of Psychology and Social Work (www.state.ma.us/reg/ boards) and the Board of Registration in Medicine (www.massmedboard.org). If defense counsel knows that the defendant already has access to records being sought, or that the witness has counsel in a parallel

proceeding, or that the witness' caregiver is a licensed professional whose records are privileged, defense counsel should be required to inform the court of those facts. Cf. Matter of Griffith, 440 Mass. 500, 508 (2003) (lawyer improperly withheld from judge information judge needed to determine if records were privileged pursuant to G.L. c. 111, § 70F). Where a defendant is less than forthcoming with information that the judge needs to make the findings at Bishop Stages 1 & 2, the judge may infer that the defendant's motion is not made in good faith but is merely a "fishing expedition."

Contents of Order to Keeper of Records:

The form order to the keeper of records [draft form attached] is two pages long. The first page is the summons. The second page is an affidavit of qualifications of the caregiver, to be used in cases where the witness has asserted a privilege, or the keeper of records asserts a privilege on the witness' behalf. On the reverse of the affidavit of qualifications is the language of several of the most commonly asserted privilege statutes defining the professional qualifications of certain caregivers (psychotherapists, sexual assault counselors, domestic violence victims' counselors, social workers). This is to avoid the prospect of a keeper of records just checking off boxes on the affidavit without knowing the statutory requirements.

The form order states that the witness has been given notice and an opportunity to object to the issuance of the order, and

that the records will be subject to a protective order. The form order states that if the witness has asserted a privilege (or the keeper of records does so on the witness' behalf), the keeper of records must: (1) produce the documents under seal and (2) identify the name(s) and professional license number(s) of the caregiver(s) and, where applicable, the statutory privilege(s) that pertain to the professional licenses of the caregiver(s). The form order provides blanks for the keeper of records to fill in with the information sought in (2), which is to be disclosed to counsel prior to the record review hearing so that counsel may prepare to contest (or advocate for) the validity of the privilege. The form order states that if the keeper of the records can do so without undue burden, the keeper of the records should segregate the non-privileged portions of the records from the privileged portions and file them in separate envelopes.

Effect of HIPAA:

Keepers of records are more likely to respond promptly to orders for records if those orders state that notice of the order has been provided to the witness, and that if the records are made available to counsel, a protective order will be in place. The attached draft notice and protective order would provide some assurance to health care providers that in responding to a Lampron summons they would not run afoul of HIPAA regulations.

Federal regulations promulgated under the Health Insurance

Portability and Accountability Act of 1996 ("HIPAA") direct that a health care provider may disclose protected health information in response to a court order "provided that . . . [it] discloses only the protected health information expressly authorized by such order." 45 C.F.R. § 164.512(e)(1)(i). In many cases, conscientious compliance with that regulation would prove extremely burdensome to keepers of records, or take far longer than the 14 days anticipated under this protocol.

The HIPAA regulations provide that, in the alternative, when a litigant seeks protected health information beyond what is expressly authorized by a court order, the health care provider may disclose it if the health care provider "receives satisfactory assurance" that "reasonable efforts have been made" (1) to give the witness notice of the legal process and an opportunity to raise an objection; and (2) to secure a protective order that prohibits the parties from using or disclosing the protected health information for any purpose other than the relevant litigation, and requires that the protected health information be returned to the keeper of records or destroyed at the end of the litigation. 45 C.F.R. § 164.512(e)(1)(ii)-(vi). See also G.L. c. 66A, § 2(k) (state agency, including DSS, must inform data subject of disclosure of information pursuant to legal process); 940 C.M.R. 1107(1) (procedure for data subject to object to dissemination).

In any event, the HIPAA regulations about protective orders

seem to be anticipating situations where a litigant would be seeking records outside the supervision of a court (e.g., in connection with a civil deposition), and are directed toward requiring those litigants to agree to be subject to a protective order in order to be entitled to the records. The situation is different here, where a judge may order production of a broad or vague category of documents pursuant to a Lampron summons, and the keeper of records may be over-inclusive in responding by sending documents beyond what is "expressly authorized by such order," 45 C.F.R. § 164.512(e)(1)(i).

4. The Return Date:

No objection to language of Step 4 of Alternative Protocol B, except that Step 4(b) should be amended to add the underlined language: "records . . . as to which no claim of privilege or privacy concern or other legitimate interest is made shall be made available to counsel for the parties immediately."

Commentary:

As to documents summonsed under Rule 17(a)(2), "no inspection of summonsed documents, by either side, shall be allowed until after a full consideration of any privileges, privacy concerns, or other legitimate interests brought to the judge's attention in timely fashion." Mitchell, 444 Mass. at 800.

Ideally, there should be a designated "Bishop clerk" in each clerk's office.

E. Record Review Hearing – *Bishop* Stages 1 - 3:

Bishop Stage 1: First, the judge determines that at least some of the records are in fact privileged, specifies the statutory privilege(s), and finds if the witness is asserting any privilege. See Bishop, 416 Mass. at 181. From the information submitted by the witness and the keeper of records, and from the judge's own review of the records, the judge should have sufficient information to make the Stage 1 determination. The determination of privilege may not be made ex parte. Mitchell, 444 Mass. at 799.

Where there have been brought to the judge's attention "privacy concerns" or "other legitimate interests," Mitchell, 444 Mass. at 800, that fall short of a full statutory privilege, the judge has discretion to restrict access to the records, e.g., by making them available to counsel only in the clerk's office, or by making them subject to a protective order. In deciding whether to restrict access to such non-privileged but private records, a judge should consider whether their unrestricted disclosure would serve a legitimate purpose of the defense, or simply embarrass the witness.

Bishop Stage 2: Then the judge will consider whether the defendant has met the existing standard of relevance and materiality set forth in Bishop, 416 Mass. at 181-182, Fuller, 423 Mass. at 226, and their progeny. "A judge should undertake an in camera review of records privileged under §20J, only when a

defendant's motion for production of the records has demonstrated a good faith, specific, and reasonable basis that the records will contain exculpatory evidence which is relevant and material to the issue of the defendant's guilt. By 'material evidence' we mean evidence which is not only likely to meet criteria of admissibility, but which also tends to create a reasonable doubt that might not otherwise exist… We emphasize, however, that there is to be no 'unrestrained foray into confidential records in the hope that the unearthing of some unspecified information would enable [the defendant] to impeach the witness.' " *Commonwealth v. Fuller*, 423 Mass. 216, 226, 667 N.E. 2d 847 (1996) (citing to *Commonwealth v. Gallarelli*, 399 Mass. 17, 21, 502 N.E.2d 516 (1987); *Commonwealth v. Bishop*, 416 Mass. 169, 182, 617 N.E. 2d 990 (1993)).

In making this determination, the judge may consider (1) the Lampron showing already made; (2) police reports and grand jury minutes (to be provided by defense counsel); (3) other pleadings already on file (e.g., in some counties, a statement of the case); and (4) any additional written offer of proof either party makes about what the evidence will show at trial. Proffers should be in writing so that they will be available to trial court judges who may have to revisit the issue before transcripts are available.

Privileged but relevant documents: As to any privileged documents for which the judge determines that the records meet the Bishop-Fuller Stage 2 showing, the judge orders that the documents are to be made available to Commonwealth and defense counsel pursuant to a protective order [draft form attached].

This is Bishop "Stage 3," 416 Mass. at 182.

Privileged and irrelevant documents: These should be kept for appellate review.

Non-privileged documents: As to documents as to which either (1) there has been asserted no privilege, privacy concern, or other legitimate interest or (2) the judge has determined that no privilege, privacy concern, or other legitimate interest applies, the judge shall order those documents to be made available for both counsel to view in the clerk's office, but counsel may not copy them unless a judge allows a motion requesting copies.

Commentary:

Consolidating *Bishop* Stages 1 & 2:

Fusing Bishop Stages 1 & 2 into a single hearing will save judges' time; as it is, judges usually think about relevance when determining privilege, and privilege when determining relevance. Indeed, in Bishop, the Court stated: "In considering the defendant's request [at Stage 2] the judge may consider, among other things, the nature of the privilege claimed, the date the target records were produced relative to the date or dates of the alleged incident, and the nature of the crimes charged." Bishop, 416 Mass. at 180 (emphasis added) (quoted in Liacos § 13.5.4 n.16).

As originally written, the Bishop protocol handicapped judges by requiring them to determine at Stage 1 what

privilege(s) actually applied to the records without being able to look at them; the records did not come into court until Stage 2. Bishop, 416 Mass. 181-182. Fusing Stages 1 and 2 would enable judges to look at the records when determining privilege. Cf. Miller v. Milton Hospital & Medical Center, Inc., 54 Mass. App. Ct. 495, 501 (in determining whether records were subject to G.L. c. 111, § 204 peer review privilege, judge properly looked at them), further appellate review denied, 437 Mass. 1104 (2002).

Exceptions to Privilege Statutes:

Certain statutory privileges have exceptions that may apply if the defense can make a showing that the witness has placed her/his mental condition at issue and it is more important to the interests of justice that the communication be disclosed than kept confidential. G.L. c. 233, § 20B(c) (psychotherapist-patient privilege); G.L. c. 112, § 135B(c) (social worker-client privilege). The privileges for sexual assault and domestic violence counselors, G.L. c. 233, §§ 20J & 20K, contain no such exception; the Fuller standard applies to them.

The mere fact that a witness has reported a sexual assault should not amount to putting her/his mental condition at issue under G.L. c. 233, § 20B(c) or G.L. c. 112, § 135B(c). Ordinarily the witness does not stand to benefit from a criminal prosecution in the same way that she/he would from a civil suit for damages. Judges should not inject into the Bishop protocol a

presumption that there must be something "wrong" with a sexual assault victim who obtains counseling. See Commonwealth v. Stockhammer, 409 Mass. 867, 884-885 (1991) ("We . . . remind lawyers and judges that the mere fact that such a victim sought counseling may not be used for impeachment purposes.").

Form of Protective Order:

The form protective order attached is largely based on the one in the appendix to Bishop, 416 Mass. at 189. This version adds a new ¶ 1, which provides that "the parties are prohibited from using or disclosing the records for any purpose other than this litigation." That language is necessary to comply with 45 C.F.R § 164.512(e)(1)(v)(A) (discussed at p. 8 above), which defines a qualified protective order as one which "[p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested." The original Bishop protective order provided that "[c]ounsel shall have access to the records solely in their capacity as officers of the court," but did not restrict the parties' use of the records – thus, it could be interpreted to permit a defendant to use a witness' records to embarrass or harass the witness.

Discretion to Restrict Access to Non-privileged but Private Records:

Simply because a document obtained under Rule 17 is not subject to a statutory privilege should not mean that the parties just get a copy of it. Because a Rule 17(a)(2) summons is not a discovery tool, the parties have no right to obtain copies of all documents produced in response to it. Often nonprivileged documents are voluminous and/or not strictly responsive to the summons, or their dissemination could cause embarrassment or invade someone's privacy.

Examples of situations where a judge may restrict access to records not subject to a statutory privilege include:

1. As a result of the witness' mistake or the care provider's fraud, a witness reasonably believed that a care provider had the professional qualifications to make the records subject to a statutory privilege, but in fact the care provider did not.
2. The witness has informed the prosecutor, who has informed the Court, that she will be embarrassed if her grades in her school records are publicly disclosed. Those grades are not privileged, but they are irrelevant or peripheral enough to the defense theory that defense counsel could prepare

> for trial by reviewing the grades in the clerk's office or obtaining them subject to a protective order. If defense counsel obtains the grades without restriction and discloses them to the defendant, the defendant could disseminate the grades in the witness' school in order to embarrass the witness and intimidate her from testifying.

"In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the rights of such a person." Mass. R. Prof. Cond. 4.4.

6. Motions to Disclose or Use Records – *Bishop* Stage 4:

After receiving access to any privileged but relevant records at Stage 3, the defendant (or the Commonwealth) may file a written motion, to be heard at or before the final pretrial conference, to disclose those records (e.g., to an expert) and/or use them at trial, on the grounds that (a) they are not in fact privileged; or (b) if privileged, such disclosure or use is required to provide the defendant a fair trial.

Commentary:

Ordinarily, if the motion is simply to use the records at trial (as opposed to, e.g., disclosing them to an expert), it may be filed at the final pretrial conference, 14 days before trial. If the motion is to disclose the records to an expert, it should be filed enough in advance of the scheduled trial date to permit counsel to later have time, based on what the expert says, to file additional motion(s) to disclose the records or use them at trial.

At or before the final pretrial conference, the judge hears any motion to disclose records, Bishop, 416 Mass. at 182-183. As discussed there, the moving party bears the burden of showing that the records are not privileged or that disclosure is necessary for a fair trial. The judge may set terms and conditions on disclosure, but should resolve any doubt in the defendant's favor. The motion must be in writing, and judge should make written findings and rulings. Any undisclosed materials should be preserved for appellate review.

7. Trial – *Bishop* Stage 5:

Upon a defense motion on which the defendant bears the burden, the trial judge may conduct a voir dire on admissibility of records, considering whether trial testimony has changed circumstances about relevance. Bishop, 416 Mass. at 183.

Commentary:

Judges should keep in mind that "'information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.'" Bishop, 416 Mass. at 183, quoting Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

8. Preservation of Records for Appeal:

The clerk's office should retain any records produced in response to a Rule 17 summons at least until the end of the direct appeal.

Commentary:

Super. Ct. R. 14 provides that exhibits other than hospital records shall be retained by the clerk for three years after the trial or hearing at which they were used, unless sooner delivered to the party or counsel to whom they belong or who introduced them. After three years, the rule provides, the clerk may destroy or discard the exhibits after giving 30 days' notice to the party who introduced the exhibits. As for hospital records introduced as exhibits, Super. Ct. R. 13 provides that they "shall be returned to the hospital upon the conclusion of the trial unless the court otherwise orders."

Notwithstanding those Superior Court Rules, records produced in response to a Rule 17 summons (including those not introduced at trial) should be retained by the clerk's office at least until

the end of any direct appeal. See Commonwealth v. Esteves, 429 Mass. 636, 642 (1999); Mass. R. App. P. 8(a), 9(a).

The HIPAA regulations require that the protected health information be destroyed or returned to the health care provider "at the end of the litigation or proceeding," 45 C.F.R. § 164.512 (e)(1)(v)(B), which should mean at least until the end of the direct appeal, and not simply the end of trial.

The question remains as to how long after the direct appeal the clerk's office should be required to retain Rule 17 records in case the defendant might someday file a motion for new trial. After the direct appeal the clerk's office could destroy the records, and in fact may be required to do so by the HIPAA regulation discussed above. If the records were introduced as exhibits, the clerk's office should give 30 days' notice to both parties that the clerk's office intends to destroy the records, see Super. Ct. R. 14.

TIMELINE FOR MODIFIED BISHOP PROTOCOL

Note that the scheduling of some events (those in **bold**) is fixed by the Standing Order. The column at left shows the number of days elapsed since arraignment, first for C track cases (including rape), and then for B track cases (sexual offenses other than rape).

Arraignment

0 days/Dates for PTC and PTH are set, and time standards begin to
0 days run. Mass. R. Crim. P. 7(e); Standing Order 2-86(II).

Pretrial Conference

90 days/This date is set at arraignment by Standing Order 2-86
45 days (II), and usually occurs within 90 days of arraignment for C track cases (rape), 45 days for B track cases (sexual offenses other than rape).

Commonwealth files certificate of compliance that it has disclosed or provided all discoverable items, other than reports of experts. Mass. R. Crim. P. 14(a)(3).

Pretrial Hearing/Deadline for Filing Discovery Motions

180 days/This date is set at arraignment by Standing Order 2-86
135 days (II), at within **180** days of arraignment for C track cases (rape); within **135** days for B track cases (other sexual offenses). At the PTH, the judge confirms the case track designation depending on the complexity of the issues in the case. Standing Order 2-86(VII).

Rule 14 Lampron motions must be filed by this date. As discussed above (page 2), Rule 17 Lampron motions should have to be filed by this date as well. Upon a showing of "good cause," the defendant may file a later Lampron motion under either rule.

In rape cases, between the PTH (**180** days from arraignment) and the final pretrial conference (**346** days from arraignment), there are now 166 days for Lampron and record review hearings and the production of relevant records.

Assuming a Lampron motion is timely filed at the PTH, a hearing on it is scheduled within 14 days.

Fourteen-Day Period for Notice to Privilege Holder

180-194During the 14 days between the PTH and the Lampron hear-
135-149ing, ADA notifies witness that the motion has been filed and of date of hearing, as required by G.L. c. 258B, § 3(g), and provides witness with form assertion/waiver of privilege.

Lampron Hearing

194 days/Fourteen days after PTH, Lampron hearing is held, where

149 days applicable.

Deadline for Filing Non-Discovery Pretrial Motions

201 days/21 days after the PTH is the deadline for filing non-dis-

156 days covery pretrial motions, unless "good cause" can be shown for filing them later. See Mass. R. Crim. P. 13(d)(2). If a Rule 17 Lampron motion is considered a "non-discovery" motion, it must be filed by this date, absent good cause for filing later. See discussion at page 2 above.

Record Return Day

209 days/The case shall be placed on an administrative list for a

164 days clerk to determine, on the day after the return day, whether the records have been produced. If the records have not been produced, an order to show cause will issue scheduling a contempt hearing in seven days.

Until trial, there are still 151 days left in rape cases (Track C), and 106 days in cases involving sexual offenses other than rape (Track B).

Record Review Hearing – Bishop Stages 1-2

224 days/The judge reviews the records and determines privilege and

179 days relevance.

Until trial, there are still 136 days left in rape cases (Track C), and 91 days in cases involving sexual offenses other than rape (Track B).

Final Pretrial Conference – Bishop Stage 4

346 days/This date is set at the PTH to occur 14 days before the

256 days scheduled trial date, pursuant to Standing Order 2-86(VI), -(VII) & -(X). At the Final Pretrial Conference, the parties must file a Joint Pretrial Memorandum including a statement of disputed legal issues and list of anticipated pretrial or trial motions. This should include motions to use any Bishop material at trial (Bishop Stage 4).

Trial – Bishop Stage 5

360 days/This date is set at the PTH pursuant to Standing Order

270 days 2-86(VI), -(VII) & -(X) and Mass. R. Crim. P. 11(b)(2) (iii). At trial, either party may move for admissibility of Bishop records, and ask for a voir dire. This is Bishop Stage 5.

TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Commonwealth v. _____, _____ Court
No. _____

ORDER FOR KEEPER OF RECORDS TO PRODUCE RECORDS

To: Keeper of Records,
_____ (*name of institution/employer of caregiver)*
_____ *(address)*

The Court **ORDERS** you to produce the following records by delivering them on or before _____ *(date)* to:

Clerk of Court,
_____ Court
_____ *(address)*
Attention: _____, telephone _____ *(name/phone of contact person in clerk's office):*

Treatment records pertaining to _____ *(witness' name),* _____ *(DOB),* for the dates of treatment from _____ to _____ by _____ _____ (*name and professional title of specific caregiver).*

You are further informed that:

☐ Reasonable efforts have been or are being made to ensure that the witness named above, to whom the records pertain, has been given notice of this order and an opportunity to assert any applicable privilege(s), privacy concerns, or other legitimate interests.

☐ At this point, the records are being sought only for review by a judge in order for the judge to determine if any applicable privilege(s) apply and if the records should be disclosed to counsel for the parties in this case. If the records are disclosed to counsel for the parties, the records will be subject to a protective order that prohibits the parties from using or disclosing them for any purpose other than this case and directs that the parties must return all copies to the Court at the end of the case. The Court will retain the records during the pendency of any appeal.

☐ The witness named above has asserted a privilege in writing, a copy of which is enclosed. Notwithstanding that assertion of privilege, the Court has determined that your disclosure of the records to the Court is necessary in the interests of justice.

☐ If the witness has asserted a privilege, or if you as the keeper of records are asserting a privilege on the witness' behalf, you are **ORDERED** (1) to produce the privileged records **UNDER SEAL** and (2) to complete and return the enclosed Affidavit of Qualifications of Caregiver. If you can do so without undue burden, you should segregate any non-privileged portions of the records from the privileged portions and file them in separate envelopes, marked to designate whether they are non-privileged or privileged.

Date Issued: _____ Signature of Justice: ×
_____

Printed Name of Justice:

_____

Note: Before issuing this order the judge must find that the moving party has satisfied the standard of Commonwealth v. Lampron, 441 Mass. 265, 269 (2004) (quoting United States v. Nixon, 418 U.S. 683, 699-700 (1974)).

TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Commonwealth v. _____,
_____ Court No. _____

To: _____ *(Keeper of Records)*

This notice pertains to the treatment records of _____ *(witness' name),* _____ *(DOB),* for the dates of treatment from _____ to _____ by _____ _____ (*name and professional title of specific caregiver).*

A hearing on this motion has been scheduled for _____, 20__ at ___ _.m. in Courtroom ___ of the _____ Courthouse at _____ *(address)*.

YOU ARE ORDERED to complete the Affidavit of Qualifications below and send it to _____ *(name and address of clerk)* or by fax to _____*(fax number)* so that it will be received before the date of the hearing as set forth above.

AFFIDAVIT OF QUALIFICATIONS OF CAREGIVER

I, the undersigned, being duly sworn, depose and say that:

1. _____ *(caregiver's name)* is licensed in Massachusetts as a _____ *(professional title)*, license number _____.
2. I certify that, in performing medical or therapeutic services pertaining to the records described above, the caregiver met the requirements of the following statutes relating to privileges or confidentiality *(check as many as apply; requirements of certain statutes are summarized on reverse)*:

    - ☐ psychotherapist-patient records (G.L. 233, § 20B);
    - ☐ rape crisis/sexual assault counseling records (G.L. c. 233, § 20J);
    - ☐ domestic violence counselor records (G.L. c. 233, § 20K);
    - ☐ social-worker records (G.L. c. 112, §§ 135A & 135B);
    - ☐ physician-patient records (Alberts v. Devine, 395 Mass. 59 (1992));
    - ☐ Department of Social Service records (G.L. c. 119, §§ 51E & 51F);
    - ☐ Department of Mental Health records (G.L. c. 123, §§ 36 & 36A);
    - ☐ Department of Mental Retardation records (G.L. c. 123B, §17);
    - ☐ records containing personal data (G.L. c. 66A, § 2(k));
    - ☐ special education records (G.L. c. 71B, § 3);
    - ☐ records of certain hospitals or clinics (G.L. c. 111, § 70);
    - ☐ records of patients and residents of certain facilities (G.L. c. 111, § 70E);
    - ☐ federally funded substance abuse treatment program records (42 U.S.C. § 290dd-2);

- ☐ records of HTLV-III tests (G.L. c. 111, § 70F);
- ☐ records pertaining to venereal diseases (G.L. c. 111, § 119); and/or
- ☐ other (specify):
  _____.

Signed under the penalties of perjury: ×_____ Print name: _____

Date: _____

G.L. c. 233, § 20B: Defines a “psychotherapist” as: “a person licensed to practice medicine, who devotes a substantial portion of his time to the practice of psychiatry[,] . . . [or] a person who is licensed as a psychologist by the board of registration of psychologists[,] or a person who is a registered nurse licensed by the board of registration in nursing whose certificate of registration has been endorsed authorizing the practice of professional nursing in an expanded role as a psychiatric nurse mental health clinical specialist, pursuant to the provisions of section eighty B of chapter one hundred and twelve.”

G.L. c. 233, § 20J: Defines a “Sexual assault counsellor" as “a person who is employed by or is a volunteer in a rape crisis center, has undergone thirty-five hours of training, who reports to and is under the direct control and supervision of a licensed social worker, nurse, psychiatrist, psychologist or psychotherapist and whose primary purpose is the rendering of advice, counseling or assistance to victims of sexual assault.”

G.L. c. 233, § 20K: Defines a “Domestic violence victims’ counselor” as “a person who is employed or volunteers in a domestic violence victims’ program, who has undergone a minimum of twenty-five hours of training and who reports to and is under the direct control and supervision of a direct service supervisor of a domestic violence victims’ program, and whose primary purpose is the rendering of advice, counseling or assistance to victims of abuse.”

G.L.. c. 112, §§ 135A & 135B apply to a “social worker licensed pursuant to the provisions of section one hundred and thirty-two or a social worker employed in a state, county or municipal governmental agency.” The confidentiality requirements of § 135B also apply to “any colleague, agent or employee of any social worker, whether professional, clerical, academic or therapeutic.”

TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Commonwealth v. _____, _____
Court No. _____

NOTICE TO WITNESS OF MOTION FOR RECORDS

To: _____ *(Witness' Name)*
_____ *(Witness' Address (if not impounded))*

This notice is being sent to you by order of the Court to inform you that the defendant has filed a motion to be allowed to see the records of your treatment by *(give name and professional title of caregiver)* _____ _____ which are being held by *(give name and address of keeper of records)* _____, for the dates of your treatment from _____ to _____.

A hearing on this motion has been scheduled for _____, 20__ at ___ _.m. in Courtroom ___ of the _____ Courthouse at _____ *(address)*. You have the right to attend the hearing.

You have the right to assert any privileges or rights of privacy you may have in those records.

Please complete the bottom portion of one copy of this form and return it to the Court so that the Court will receive it before the hearing to _____ *(name, address, telephone number, and fax number of clerk)*.

If you do not return this form to the Court at or before the time of the hearing, the judge might assume that you do not wish to assert any privilege or right of privacy in the records. Then the judge may order that the records be brought into Court, and the judge may then review them or may disclose them to the defendant's lawyer and the prosecutor for their review.

Date Issued: _____ Signature of Justice: ×
_____

INVOCATION/WAIVER OF PRIVILEGE

(Check one):

- ☐ I wish to assert (claim) all applicable privileges and/or rights of confidentiality in my records.
- ☐ I wish to waive (give up) all applicable privileges and/or rights of confidentiality in my records.

Signed: ×_____ Date:
_____

Copy sent to:
_____ *(Keeper of Records)*

[two copies of this form – one for witness to keep and one to return to court]

TRIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Commonwealth v. _____,
_____ Court No. _____

PROTECTIVE ORDER

Top of Form
Upon consideration of the defendant's motion for discovery of the victim's treatment records and pursuant to Commonwealth v. Bishop, 416 Mass. 169, 182, 189 (1993), it is hereby ORDERED [notwithstanding the provisions of G. L. c. 66A (2005 ED.),][]] that such records be produced to counsel subject to the following terms and conditions:

1. The parties are prohibited from using or disclosing the records for any purpose other than this litigation for which the records were requested, without prior application to and an order of the court.

2. Counsel shall have access to the records solely in their capacity as officers of the court. Counsel shall not disclose or disseminate any portion of the contents of the treatment records to anyone, including the defendant, without prior application to and an order of the court. [Counsel shall notify the Department of Social Services (DSS) and all third-party data subjects referred to in those records before making such application.] *

3. The treatment records sought by the defendant shall be made available to counsel in the Court House during regular business hours under arrangements to be made by the clerk. Counsel may read and make notes concerning the treatment records, but no portion of the treatment records shall be photocopied or reproduced without prior application to and an order of the Court. [Counsel shall notify DSS and all third-party data subjects referred to in those records before making such application.] *

4. Counsel shall not offer or adduce any portion of the victim's treatment records in evidence at trial or in connection with any other proceeding except on order of the Court. [Counsel shall notify DSS and all third-party data subjects referred to in those records before making such application.] *

5. At the conclusion of any trial or other disposition of this action, counsel shall deliver to the clerk, under seal, all originals and all copies of any treatment records produced to counsel for the defendant pursuant to any subsequent order of the court.

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* Language in brackets applies only to records of the Department of Social Services (DSS) or other State agencies, which must comply with the Fair Information Practices Act, G. L. c. 66A (2005 ed.).